

(1997) 01 KL CK 0039
In the High Court Of Kerala
Case No : M.F.A. No. 643 of 1988

Employees State Insurance Corporation	APPELLANT
Vs	
C.P. David	RESPONDENT

Date of Decision : 28-01-1997

Acts Referred:

Employees State Insurance Act, 1948 — Section 2(1), 2(12), 3, 40, 45
Kerala Revenue Recovery Act, 1968 — Section 7

Citation : (1997) 1 KLJ 396 : (1999) 1 LLJ 941

Hon'ble Judges : V.V. Kamat, J;K.A. Mohamed Shafi, J

Bench : Division Bench

Advocate : Sankarankutty Nair and T.V. Ajayakumar, for the Appellant; M.V. Joseph and Varghese Myloth, for the Respondent

Judgement

V.V. Kamat, J.—The question that is required to be considered in this appeal is as to whether the employees of the original applicant "Kothamangalam Aggregates" would be required under law to be insured in the manner provided by the Employees State Insurance Act, 1948. By the impugned order dated April 6, 1988 in I.C. No. 82/1986, the insurance Court has decided that the establishment cannot be covered under the provisions of the Employees State Insurance Scheme because there is a clear exemption provided u/s 2(12) of the Act. The Insurance Court has reached the conclusion that the establishment cannot be understood to be a factory because explosives are used for mining operations, an activity covered under the provisions of the Mines Act.

2. After hearing the learned Counsel for the Appellant Corporation with regard to its grievance as well as the learned Counsel for the applicant-establishment, we find ourselves unable to agree with the conclusions for reasons to follow after spread over of the factual matrix. The proceedings came up before the Insurance Court on the basis of the application of the Manager of Kothamangalam Aggregates. The application states that it is an establishment engaged in blasting operations of rubbles and crushing materials. It appears from the application

itself that although the activity commenced in 1983-84 to start with a handful of workmen since April 1984 there has been 10 or more workmen. The proprietor is one Sri Thomas K. Kuruvila. There is a license for blasting operations and also for possession of explosives, all for the purpose of blasting operations. It is contended in the application that the establishment is a mine in accordance with the provisions of Mines Act, 1952.

3. In the narrative of the application, in paragraph 2 it is stated that since April, 1986 there was a long pending labour struggle in and around the establishment, during which time one Inspector of the E.S.I. Corporation visited the establishment and verified the records. It is averred that at that time the said Inspector thought and opined that it was subject to the operation of the Mines Act.

4. It is then averred that thereafter sometime in October, 1986 two copies of notices in Form C. 19 dated September 30, 1986 came to be served. They are requisitions for recovery of E.S.I. Contribution with resort to revenue recovery steps. It is stated in the application itself that the first requisition is for Rs. 7,560 towards contribution for a period commencing on September 11, 1983 upto January 26, 1985. Rs. 1,043 is added as interest demanding a total amount of Rs. 8,603.

5. The second requisition is for Rs. 19,163 for a period commencing on January 27, 1985 upto March 31, 1986. The total of Rs. 19,163 gets split up into Rs. 18,069.81 as the principal amount and Rs. 1,093.19 as interest thereon. The two notices are annexed to the application, contents thereof referring to the resort to revenue recovery proceedings u/s 7 of the Revenue Recovery Act.

6. The application urges that there is no liability in regard to the payment of E.S.I. contribution since the activity is subject to the operation of the Mines Act. It needs to be noted that alternatively it is pleaded that the claim is excessive and unjustified as regards quantum. It is pleaded that the situation as to whether the establishment is a covered establishment under the E.S.I. Act and as a result the applicant would be an employer liable in regard thereto is a question under dispute.

7. In the counter-affidavit of the Corporation in the nature of the written statement it is contended that w.e.f. September 11, 1983 in accordance with the provisions of Section 2(12) of the Act, on the ground that there were more than 20 employees on the above date as per an inspection conducted on March 7, 1987 by a communication compliance with the various provisions of the Act was demanded. It is stated that the concerned establishment cannot be regarded as a mine as defined in the provisions of the Mines Act, 1952. It is urged in support thereof that there is no manufacturing process below the ground level and therefore the activity of the concerned establishment could not be regarded as mining activity.

8. It is placed on record that the Insurance Inspector who visited the factory

frequently for verification of records had factually found that the quarry was not in operation. It is also referred to that the said Inspector noticed that lorries carrying granite were being brought there from outside at the time of his visit, illustratively on December 15, 1985. It is also added that on another occasion on September 26, 1936 the quarry was found to be in operation. It is urged that a situation is created to escape from the coverage of the E.S.I. Act.

9. In this context it is specifically urged that since the establishment is covered by the E.S.I. Act, the dues that are demanded would be a liability as a result of the coverage of the provisions of the E.S.I. Act.

10. The evidence of the applicant as well as of the Corporation's Inspector has been recorded by the Insurance Court. In the impugned judgment, particularly in paragraph 5 thereof, it is observed:

At the time of evidence the applicant has produced certain documents linking the applicant's establishment with other similarly placed concerns coming under the Mines Act.

Although on the assumption that the material is tendered on record, even if the Department treated the situation relating to the activity with reference to other similar placed concerns, in our judgment, that would not be the position of law. However, it needs to be noted in this connection in regard to the above quoted observations that with the help of the learned Counsel for both sides, even after scanning the records ourselves we do not find anything to support the above observation of the Insurance Court. As stated above, even in spite of the above situation, in the context of the activities spread over hereinbefore, it would have to be determined as to whether the activity could be understood as a mining activity in accordance with the position hereinafter to be considered.

11. As stated above all employees of factories or establishments to which the E.S.I. Act, 1948 applies are required to be insured in the manner provided by the Act. Factories and establishments are required to be understood in the context of their activities. As stated in the application itself, the applicant-establishment gets engaged in blasting operations of rubbles and crushing metals.

12. Section 2(12) of the Act conveying to us as to what is meant by "factory" emphasises the employees in the process of carrying on of a manufacturing process either with the aid of power or in the ordinary other process. In the language a situation of exception gets carved out when it has specified that such process "does not include a mine subject to the operation of the Mines Act, 1952" so far as is relevant.

13. Therefore, in the first instance, engagement in any part of a manufacturing process of 10 or more persons or 20 or more persons for wages on any day of the preceding 12 months and in any part in which the manufacturing process is being carried on would get governed by the provisions of the Act unless the establishment could be understood as a mine subject to the operation of the

Mines Act, 1952.

14. It is this position that would take us to consider in the context of the activity of the applicant as to whether the activity would be a mining activity in accordance with the provisions of the Mines Act, 1952.

15. "Mine" gets defined in Section 2(1)(j) of the Act. For our purpose it means any excavation where any operation for the purpose of searching for or obtaining minerals has been or is being carried on and in the sense it includes the specified situation in Sub-clauses (i) to (xi) of Section 2(1)(j) of the Act. Therefore in accordance with the statutory provision of Section 2(1)(j) it will have to be ascertained as to whether there is any excavation for the purpose of searching for or obtaining minerals in relation to the activities of the applicant.

16. Apart there from, the Mines Act, 1952 also conveys certain situations to which the provisions of the Act are not to apply. This is provided by Section 3 of the said Act. The relevant portion of Section 3 of the Act needs reproduction as follows:

The provisions of this Act, except those contained in Sections 7, 8, 9, 40, 45 and 46 shall not apply to-

(a) any mine or part thereof in which "excavation" is being made for prospecting purposes only and not for the purpose of obtaining minerals for use or sale

Provided that-

(i) not more than twenty persons are employed on any one day in connection with any such excavation:

(ii) the depth of the excavation measured from its highest to its lowest point nowhere exceeds six meters or, in the case of an excavation for coal, fifteen metres; and

(iii) no part of such excavation extends below superjacent grounds; or

(b) any mine engaged in the excavation of kankar, murrum, laterite, boulder, gravel, shingle, ordinary sand (excluding moulding sand, glass sand and other mineral sands), ordinary clay (excluding kaolin, china clay, white clay or fire-clay), building stone, slate road metal, earth, fullers earth, marl chalk and limestone;

Provided that-

(i) the workings do not extend below superjacent ground; or

(ii) where it is an open cast working-

(a) the depth of the excavation measured from its highest to its lowest point nowhere exceeds six meter.

- (b) the number of persons employed on any one day does not exceed fifty; and
- (c) explosives are not used in connection with the excavation.

Reading of the above statutory provision, it would be seen that certain situations are not regarded as mining activities by the said provision. Illustratively, if excavation is being made for prospecting purposes only and not for the purpose of obtaining minerals, then such an activity cannot be understood as a mining activity. Thus the provision of Section 3(a) would serve as an indicator of guidance to understand and examine the activity which is claimed to be "excavation" by way of the contention of the applicant.

17. Similarly, if the activity [Section 3(b) of the Act], even if properly understood as "excavation" of certain commodities, is not understood as mining activity for the application of the Act. In the context of the factual situation before us, the above statutory proviso of Section 3(b) would throw a lens-light on the situation. If the excavation happens to be of laterite, boulder, gravel, shingle, ordinary sand, building stone, road metal, earth, limestone, etc., the activity is such that the provision would not consider it to be a mining activity. There is also a qualification in the nature of the proviso thereto that the working do not extend below superjacent ground and where there is an open cast working, the depth of the excavation measured from its highest to the lowest point should not exceed six meters and the employees do not exceed 50.

18. In our judgment, the above statutory provisions will have to be appreciated in the context of the provisions of the E.S.I. Act, 1948 for the purpose of determination as to whether the activity could be regarded as a mining activity.

19. A bare cursory perusal of the provisions of the E.S.I. Act would show that it contemplates welfare of the employees by affording benefits to them in case of sickness, maternity and employment injury.

20. In the context of the situation as to whether the concerned employees would be required to be insured in the manner provided by the Act, with regard to the establishment in question, the above statutory provision would have to be considered for their application to the undisputed factual matrix spread over hereinbefore.

21. The learned Counsel for the applicant pressed into service certain factual aspects. He strenuously urged that there is a statutory license for the blasting operations. There is also a license for use of explosives in the blasting activity. The learned Counsel submitted that all these are the requirements pointing to the situation that the activity would be a mining activity. The learned Counsel also heavily relied on the observation of the Insurance Court referred to above with regard to the similarly placed concerns treated as coming under the Mines Act by the Department.

22. In our judgment, the activities are such that it would not be possible to treat them as mining activities. The application has clearly stated that the

establishment is engaged in preparation of rubbles and crushing metals for which blasting operation is necessary. The material on record also shows that the Inspector of the Corporation found that granites were being brought there from outside in lorries for getting crushed. The material on record shows that the activity of the applicant is preparation of rubbles and crushed metals. If the activity is considered in the light of the statutory provisions of Section 2(1)(j) also, the excavation cannot be in the conduct of a search for or obtaining mine in the context. Added to these, the application of the provisions of Section 3 of the Act would take the situation long away to understand the activity as a mining activity as contended by the applicant. In view of the above clear position, in our judgment, merely because the applicant possess license for blasting operation and also for use of explosives, the activity cannot be understood as a mining activity in the context of the situation.

23. The Insurance Court would have to be understood obviously to be in error when the use of the explosives tempted the Court to understand the activity as mining activity, overshadowed by the situation that there are licenses for blasting and use of explosives. In our judgment, the Insurance Court has committed an error of law in the application of the above statutory provisions.

24. For all the above reasons the impugned order is liable to be quashed and set aside.

The appeal succeeds. The impugned order dated April 6, 1988 in I.C. No. 82/1986 of the Employees' Insurance Court, Alleppey, is quashed and set aside. It is held that the applicant "Kothamangalam Aggregates" represented through its Manager is an establishment covered by the provisions of E.S.I. Act, 1948 and as such would be liable to make payment in accordance with the requisitions dated September 30, 1986/October 14, 1986 for the periods commencing on September 11, 1983 to January 26, 1985 and January 27, 1985 to March 31, 1986 in accordance with the demand notices dated November 24, 1986 u/s 7 of the Kerala Revenue Recovery Act, 1968. Ordered accordingly.